APPENDIX

VOLUME II

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-60

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS AND MARK WHITE, SECRETARY OF THE STATE OF TEXAS,

Petitioners

V.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents

On Writ of Certiorari From The United States District Court For The District Of Columbia

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PETITION FOR WRIT OF CERTIORARI FILED JULY 16, 1976

CERTIORARI GRANTED DECEMBER 6, 1976

VOLUME II

* * * * * (MOTION TO INTERVENE OMITTED)

* * * * * (APPLICATION FOR STAY PENDING APPEAL OMITTED)

* * * * * (ORDER DENYING STAY PENDING APPEAL OMITTED)

* * * * * (ORDER GRANTING SUMMARY JUDGMENT REPRODUCED AFTER TRANSCRIPT)

AFFIDAVIT INTRODUCED AT HEARING IN TRIAL COURT OMITTED. SAME AFFADAVIT WITH EXHIBITS REPRODUCED AT PAGE___ OF THE APPENDIX.

TRANSCRIPT OF HEARING IN DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

DOLPH BRISCOE,
Governor of the State of Texas
and
MARK WHITE, Secretary of
State of the State of Texas,

Plaintiffs

V.

Civil Action No.
75-1464

EDWARD H. LEVI,
United States Attorney
General, et al.,

Defendants

Washington D.C.
September 12, 1975

The above-entitled cause came on for Hearing on Plaintiffs' Motion for Temporary Restraining Order before the HONORABLE GERHARD A. GESELL, United States District Judge, at 10:00 a.m.

APPEARANCES:

WILLIAM S. RHYNE, Esq.
DONALD CARR, Esq.,
Washington, D.C.,
JOHN W. ODAM,
Executive Assistant Attorney General
LONNIE ZWEINER,
Assistant Attorney General,
RICHARD J. BACIGALUPO, Esq.,
Austin, Texas,
Counsel for Plaintiffs

IDA Z. WATSON
Official Reporter
U.S. Court House
Washington, D.C.

COPY FOR:
MR. RHYNE

APPEARANCES:

BRIAN K. LANDSBERG, Esq.
CYNTHIA L. ATTWOOD, Esq.,
JAMES KEICKHEFER, Esq.,
Department of Justice,
Counsel for Defendants

GEORGE J. KORBEL, Esq.,
San Antonio, Texas,
Amicus Curiae

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C O N T E N T S

P R O C E E D I N G S

THE CLERK: Civil Action No. 75-1464, Briscoe, et al., v. Levi, et al. Mr. William S. Rhyne, Mr. John Odam, Mr. Lonnie Zweiner, Mr. Donald Carr, Mr. Richard Bacigalupo for the Plaintiffs. Mr. Brian K. Landsberg, Miss Cynthia L. Attwood, Mr. James Keickhefer for the Defendants.

THE COURT: Good morning, gentlemen.

Mr. Rhyne.

MR. RHYNE: Good morning, Your Honor. I would like to move the admission pro hac vice of two members

of the Bar of Texas, Mr. John W. Odam, Executive Assistant Attorney General, and Mr. Lonnie Zweiner, Assistant Attorney General.

THE COURT: I am delighted to have both of you for purposes of the case.

MR. RHYNE: Your Honor, Mr. Odam will open for Texas.

THE COURT: Before we start, I want to clarify the procedural status of this case.

The Defendants have moved to dismiss and they have opposed what they refer to as a motion for preliminary injunction. The Plaintiffs, on the other hand, have filed papers moving for a temporary restraining order. There seems to be, therefore, some confusion between the parties as to what the papers are in front of the Court.

Now, since the Plaintiffs' papers are in part addressed to a publication that has already occurred, I guess on the 9th of September, I have been wondering whether the way to treat these papers is not to treat the Plaintiffs' papers as an application for a temporary restraining order or a preliminary injunction. I understand you have some testimony that you wish to offer, and since the matters are mostly matters of statutory interpretation and there are affidavits filed and there will be, I understand, some factual material submitted to me by testimony, I was wondering whether the thing to do would be for me to treat the Government's motion to dismiss as a motion for summary judgment, to rule on some of the statutory issues, as I am authorized to do under Rule 12 of the Rules of Civil Procedure.

Now, is there any objection to that process here by either side?

MR. RHYNE: No objection, Your Honor.

MR. LANDSBERG: No objection, Your Honor.

THE COURT: Then what I really have before me is a motion for summary judgment by the Defendants or a motion to dismiss or a motion for summary judgment and an application for injunctive relief, either temporary or partial or permanent, from the State of Texas.

Is that agreeable to both sides?

MR. ODAM: Correct, Your Honor.

THE COURT: All right, then I will proceed in that fashion. It may, as we go forward, enable the Court to resolve the matter today; so that whoever is disappointed will have an opportunity to ride the elevator upstairs.

MR. LANDSBERG: Your Honor, one more preliminary matter.

I have been asked by Mr. Korbel to introduce him to the Court. He is the attorney for applicants for intervention.

MR. KORBEL: Reyes, et al.

THE COURT: I haven't even seen the papers.

MR. KORBEL: Your Honor, we filed those papers late yesterday afternoon.

THE COURT: I haven't seen them.

Have you seen them, Madam Clerk?

Do you have a copy of them? They weren't served in my chambers, as required under the rules.

THE CLERK: I know there were some papers served late last night. Miss Brown took copies of what were there but, apparently, they weren't there.

THE COURT: At least, I haven't seen these papers at all. By agreement with the parties, I received some papers from Plaintiffs at my home last night; and I spent some time on them.

This is an application by the Mexican-American Legal Defense and Education Fund?

MR. KORBEL: That is correct, Your Honor, on behalf of classes of Mexican-Americans and blacks in Texas to intervene as Parties Defendant.

I am sorry we inconvenienced Your Honor. We filed those yesterday afternoon and I inquired of the clerk whether there was anything else that we had to do; and she told us, no, Your Honor.

THE COURT: She was in error.

Do you have testimony you intend to present?

MR. KORBEL: If Your Honor permits, we do have testimony which we may offer. That would depend on what the State offers, I suppose.

I might represent to the Court that we have served all counsel, all opposing counsel with copies of this intervention and we notified them at least two days ago that we intended to intervene.

THE COURT: What relief do you want?

MR. KORBEL: We are intervening to support the Justice Department in their defense of this statute.

THE COURT: What makes you think the Justice

Department doesn't adequately take care of your interests?

MR. KORBEL: We don't know that at this point yet, Your Honor. The Mexican-American Legal Defense Fund has been quite active in taking actions on behalf of Mexican-Americans and blacks in Texas dealing with their problems in voting; and we feel that our particular expertise will be of help to the Court in determining this case.

THE COURT: I don't have any doubt about that, sir. I am concerned about the procedural difficulties that this presents for the Court. If you were to appear as amicus and I had given you an opportunity to present any arguments you wished, that is an easy matter. But if you are going to intervene, under the rules these parties have a period of time to oppose. Certainly the Plaintiffs, under our rules, have a period of time, what, ten days, or something like that, to oppose; and then we would have a hearing on the question of your intervention; and I would find myself in a position where I would not be able to go forward with these proceedings.

I am not at all sure that is in your interest.

MR. KORBEL: Your Honor, we would have no objection if Your Honor would allow us to appear as amicus and to cross-examine.

THE COURT: All right. I do want to have the benefit of anything you want to tell me but I think it would be far better if we treated it that way. When we get to the argument stage, if there is something you think should be brought out, you can bring it to the Court's attention.

MR. KORBEL: I appreciate it.

THE COURT: Is that all right?

MR. KORBEL: That is fine.

THE COURT: Is that all right with the other parties?

MR. ODAM: Yes, Your Honor.

THE COURT: We will do it that way. I am glad to have you here.

All right, sir, I think we had better get any testimony out of the way before we turn to any arguments. Don't you think so?

MR. ODAM: Whatever the Court wishes.

At this time we would call as our first witness, then, Mr. Mark White, Secretary of State for the State of Texas.

THE COURT: Plaintiff in this action.

MR. ODAM: Yes, Your Honor.

Whereupon --

MARK WHITE

was called as a witness by the Plaintiffs and, having been first duly sworn, was examined and tested as follows:

DIRECT EXAMINATION

BY MR. ZWEINER:

Q What is your name?

A Mark White.

Q What is your capacity with the State of Texas, Mr. White?

A I am the Secretary of State.

Q You are a Plaintiff in this lawsuit that is being heard at the present time?

A I am.

Q Mr. White, are you familiar with the Voting Rights Act of 1975?

A Yes, sir, I am.

Q Before we go onto that, as Secretary of State, is one of your duties the supervision of elections in the State of Texas?

A It is.

Q Now, Mr. White, with regard to the Voting Rights Act of 1975, this was, I believe, enacted into law on August 6, 1975, is that correct?

A I believe that is the date on which the President signed the Bill.

Q After the Bill was signed, did you attempt to get any information or hearing before the persons or agencies charged with the duty of enforcing this Act?

A Actually, when it became apparent that the Bill would pass the Congress, I had been informed that the President intended to sign the Bill, I immediately or at that time, July the 14th, wrote letters to Mr. Vincent Barabba, Director of the Bureau of Census, and requested an opportunity to appear at a hearing and provide testimony and evidence concerning the determinations his Bureau would be called upon to render, and also to ask for information from the Director of Census as to the methodology that he intended to utilize in making his determinations.

Q What capacity did the Bureau of Census have with regard to this Act? You talk about some decision that they had to make. What determination?

A Under the Bill, under the law, the Bureau of Census is required to determine the number of registered voters that existed in the affected states, the number of actual votes cast in the Presidential Election of 1972, and also the citizens of voting age that existed in the State of Texas on November 1, 1972.

THE COURT: That isn't what the statute says, is it? It says, persons of voting age. It doesn't say, citizens; isn't that right?

MR. ZWEINER: No, Your Honor, I believe that the Voting Rights Act of 1975 refers to, citizens.

THE COURT: We are talking '65. You are talking to him about the first Act. You have been asking him about the earlier situation, sir, not the '75 Act. You haven't asked him about that yet.

MR. ZWEINER: Your Honor, I beg your pardon. If I may clarify it.

BY MR. ZWEINER:

Q The questions I have asked have been about the 1975 Act; and if those questions were asked again, would your responses be what they have been with regard to the '75 Act?

A Yes, sir, they would be.

MR. ZWEINER: I am sorry.

THE COURT: It is the '65 Act, as amended. I am

clarified now. You are talking about things you did in '75?

THE WITNESS: Yes, sir, in July of '75 under the amended Bill.

THE COURT: Under the amended Bill. Fine, thank you.

Excuse me, gentlemen.

BY MR. ZWEINER:

Q Because the Director of the Bureau of Census had to make these determinations, you did seek a hearing or an appointment or information from him, is that correct?

A Yes, I did.

Q Are these attempts and possible letters that you have previously referred to made a part of an affidavit which has been attached to the complaint herein?

A Yes, it has.

MR. ZWEINER: Your Honor, by agreement, we offer the affidavit.

THE COURT: I am taking all of those in evidence. All the affidavits that have been filed here, all attachments are part of the record already in evidence.

MR. ZWEINER: Thank you, Your Honor.

BY MR. ZWEINER:

Q Would you then explain, just very briefly, what efforts you did make to contact the Bureau of Census and the Attorney General's office, which has, I believe, a duty and a function under the Act; is that correct?

A Yes, sir. I called and talked with several members of the staff of the Justice Department; called on several occasions and talked with members of the staff of the Bureau of Census Population Studies; and have written letters on July the 14th, July 21, a telegram to Vince Barabba, on August 7 a letter to Attorney General Levi, on August the 28th a letter to Assistant Attorney General Pottinger, Attorney General Levi and Director of the Bureau of Census Barabba; and on each occasion requested an opportunity to have a hearing and present testimony and evidence and also to make inquiry of the methods and techniques that these two agencies would utilize in arriving at the determinations that they are required to make under the 1965 Voting Rights Act, as amended in 1975.

Q What was the result of your efforts, Mr. White, to obtain a hearing?

A I was not offered an opportunity for a hearing. I was not given any suggestion that I would receive a hearing or any evidence would be received.

There was a telegram sent to me on September the 2nd, from Mr. Pottinger, advising that I would be given an opportunity for a fair hearing and to submit data and information to the Bureau of Census as soon as I would contact them.

Immediately upon receiving that telegram, I contacted the Bureau of Census and was notified I would have an opportunity for a meeting but not a hearing on September the 5th.

On my way to that meeting on September the 5th, I was notified by the Bureau of Census on September 4 that they had already made their determinations that I was attempting to submit information concerning.

That happened the day before the date on which they had intended or indicated they would permit me a hearing.

Q Had you had any knowledge at all that the Attorney General's office was considering including you in the Act before the hearing was granted?

A I had read press releases from the Justice Department, as well as the Bureau of Census, which indicated that they had already made their minds up concerning Texas' inclusion under the amended Act.

Q When was that?

THE COURT: It couldn't come as a great shock to you after reading the legislative history of this statute. Texas is on almost every page of the legislative history. There was no shock about that, was there, Mr. White?

THE WITNESS: No, sir, I wasn't--

THE COURT: You knew you had a problem right when the Act was signed; didn't you? That is fair to say.

THE WITNESS: Even before the Act was signed.

THE COURT: All right, fine, let's get on then.

I think it is conceded that you had no formal hearing. I don't think that is an issue.

BY MR. ZWEINER:

Q Now, did you attend this meeting on September 5 with the Bureau of Census?

A Yes, I did.

Q Who was present at that meeting, Mr. White?

A Along with me was a Dr. John Stockton, who is the former Director of the Bureau of Business Research of the University of Texas, Austin. A Deputy Director of the Bureau of Census was in attendance, as well as Mr. Meyer Zitter, head of Population Studies from the Bureau of Census, Mr. Gil Felton, a member of his staff, and Cynthia Attwood, a member of the Department of Justice staff, the Public Information Officer of the Bureau of Census, and one other individual, whose name I don't recall.

Q I believe Mr. Zitter has submitted an affidavit. Is that the same Mr. Zitter that submitted an affidavit in this case?

A Yes.

Q Did the Bureau of Census or any of its representatives or any representative of the Attorney General's office inform you as to how they determined that Texas was covered by the Voting Rights Act of 1975? I have special reference to the number of voters registered, voting, and voting age groups.

A I was informed that they did not need to know the number of registered voters in Texas. That had no meaning for their purposes. The only information they looked to was the number of citizens of voting age and the number of people who cast ballots in the Presidential Election in 1972.

THE COURT: Mr. White, in that connection, there is one matter in the Court's mind.

What is the status of active servicemen in Texas? Can they vote?

THE WITNESS: Military personnel are permitted to vote in Texas if they assume their

residency as being Texas. However, it is my understanding --

THE COURT: At the time the Act was originally passed, that was not the case; isn't that so?

THE WITNESS: At one time, several years ago, servicemen in Texas were not permitted to vote in Texas. They are permitted and were on the dates in question, I believe.

THE COURT: By '75, they were permitted to vote?

THE WITNESS: I believe also in '72 they were permitted to vote. I am not absolutely certain.

THE COURT: I think that is right. Perhaps there was some question in '65.

THE WITNESS: I don't think they were permitted to vote in Texas in '65.

THE COURT: That was the Court's understanding. Thank you.

BY MR. ZWEINER:

Q Mr. White, have you examined Mr. Zitter's affidavit which has been filed in this case?

A I examined it briefly on yesterday.

MR. ZWEINER: Do you have that, ma'am, that affidavit of Mr. Zitter?

THE COURT: It has been filed, Madam Clerk. I have a duplicate copy.

Here it is. This is Mr. Zitter's affidavit.

MR. ZWEINER: Thank you, Your Honor.

BY MR. ZWEINER:

Q Mr. White, I show you Mr. Zitter's affidavit. Do you agree with the figure he has for the number of persons who voted in the november 1972 election?

A I think that is a substantially correct figure.

Q I believe you informed us that they do not consider a figure for the number of persons that registered in Texas as being relevant; is that correct?

A That has been their consistent statement to me, yes, sir.

Q They don't have that figure, do they?

A No, sir.

Q What would that figure be for the year 1975? Do you have that?

A 1972 or '75?

Q Seventy-two.

A It would be in excess of 5,200,000 people.

If you would like, I can give you the precise figure.

THE COURT: No, that is all right.

BY MR. ZWEINER:

Q All right. Does his affidavit have a figure for the voting-age population?

A It has a figure for the voting-age population, yes, sir.

Q All right. And apparently in that affidavit he has

made a subtraction of a figure that he terms, aliens, and arrives at a voting-age population figure; is that correct?

A Citizens of voting age, yes, sir.

Q Citizens of voting age?

A Yes, sir.

Q Do you agree with that figure?

A I do not believe that to be an accurate figure.

Q Why don't you? Is it because the criterion or the methodology used in arriving at that figure you think is incorrect?

A I was informed by the Bureau of Census, as well as the Department of Justice, that all of the aliens existing in Texas on that date were not excluded from the computations.

Q Well, did they inform you specifically that no illegal aliens that may have been present in Texas were excluded?

A They informed that they did not exclude any illegal aliens in Texas from that number.

Q Is there any other dispute that you may have?

They do have a figure for legal aliens, apparently; is that correct?

A That is my understanding that their second figure is related to legal aliens.

Q What is that figure?

A 140,657.

Q Have you obtained information anywhere that would indicate that that figure might be erroneous?

A It is my understanding that a more precise figure would be available from the Bureau of Immigration and Naturalization Service and that the figure stated here is substantially below the figure you would receive if you were to ask the agency I previously mentioned.

Q Do you have copies of the official reports of the Bureau of Immigration and Naturalization with you?

A Yes, sir.

THE COURT: They are not in the case, are they, the Bureau of Immigration and Naturalization? Congress didn't give them any responsibility. It gave Census the responsibility; isn't that right?

MR. ZWEINER: Yes, Your Honor, but it is our contention that the Bureau of Census ought to get the best figures they can for aliens.

THE COURT: Where does the statute say that?

MR. ZWEINER: We say --

THE COURT: The statute doesn't say anything about the most accurate figures they can get. It says that they are to make a determination; isn't that right? That Census is to make a determination.

MR. ZWEINER: That is true, Your Honor.

THE COURT: All right, Census made a determination.

MR. ZWEINER: That is true, Your Honor. Of course, it is our contention --

THE COURT: There is nothing in the statute that contemplated a nose count, was there, or a special new survey or a special new census or anything like that? Nothing like that in the statute.

MR. ZWEINER: That is true.

THE COURT: They made a determination.

MR. ZWEINER: That is true but, again, Your Honor, if I may say, we do say that they must use their best information. In other words, if they got a 1970 Census figure, they had better use that rather than 1960. This would be action so arbitrary that Congress could not have intended for them to make such a determination.

We feel if they have got a fellow-Government Bureau that has those figures, those figures should be used. Your Honor, it is our intention to offer these reports, if Your Honor will receive them.

THE COURT: Certainly. I want you to make your record. I want to understand your position.

Do you have any figures on how many illegal aliens vote in Texas?

MR. ZWEINER: No, Your Honor, we do not.

THE COURT: It is fairly common knowledge that some do, isn't it?

MR. ZWEINER: Yes, sir.

THE COURT: Then what are we talking about? I don't understand what we are talking about. It is a matter of ballpark figures, isn't it? It is not a matter of precise nose count.

MR. ZWEINER: That is true, Your Honor, but we do say that there are much more accurate figures available.

THE COURT: I see your point. That Census didn't use the best available data.

MR. ZWEINER: Not only that, Your Honor, they didn't use available data at all in the case of illegal aliens. That was available.

I do offer these reports for the years 1972 and '73, Your Honor, for whatever purpose they may serve the Court.

THE COURT: I will receive them. We will give them Exhibit numbers, if you hand them to the Deputy Clerk before we are through. Reserve Plaintiffs' 1 and 2 for that.

(Whereupon copy of 1972 Annual Report of Immigration and Naturalization Service was marked Plaintiffs' Exhibit No. 1 and received in evidence.)

(Whereupon copy of 1973 Annual Report of Immigration and Naturalization Service was marked Plaintiffs' Exhibit No. 2 and received in evidence.)

BY MR. ZWEINER:

Q Mr. White, with regard to illegal aliens, His Honor has asked, do we have any information at all about that.

Do we have some information about illegal aliens in Texas, a figure that could be helpful to the Bureau of Census?

A Yes, I think so. The Department of Immigration and Naturalization Service has various rules and counting techniques as well as public statements made by the head of that Bureau, in addition, public statements made by the former Attorney General Saxbe, which I think bear directly upon the question of the number of illegal aliens existing on various dates in the State of Texas.

Q Do you have a figure of the number of aliens apprehended for any recent year?

A I am informed by the Management Analyst Officer of the Bureau of Immigration and Naturalization Service that in 1972 there were 209,912 aliens deported from Texas. In the year 1973, there were 244,395 aliens deported.

THE COURT: How many of them came back the same year, do you know? Isn't that your problem? They are in and out.

THE WITNESS: Yes, sir.

THE COURT: I am not being critical but you are confronting a condition you can't control; isn't that right?

THE WITNESS: The point where I feel that this is important is in relation to the number that the head of the Immigration Service states that this figure is merely a small number of those people actually in existence in the State at any one time. Their rule of thumb is at least four and as many as five times that number reside within the State, based upon the number

that they are actually deporting from the State.

MR. ZWEINER: Your Honor, Mr. White has copies of speeches by the head of the Bureau of Immigration and Naturalization and also one of Mr. Saxbe, the Attorney General, that addresses this question and the projection of the number apprehended into a four or five times figure.

May we submit those?

THE COURT: You may mark them. I will not receive them. Speeches by Mr. Saxbe are really a little far afield.

Mark them for identification as the next exhibit number.

MR. ZWEINER: Thank you, Your Honor.

THE CLERK: No. 3.

THE COURT: No. 3, but not in evidence.

(Whereupon copies of speeches were marked Plaintiffs' Exhibit No. 3, for identification.)

THE COURT: Figures differe depending on the purpose for which you make the statement.

MR. ZWEINER: Yes, Your Honor.

Your Honor, I can illustrate, I think, our purpose by asking Mr. White this question.

BY MR. ZWEINER:

Q Mr. White, did the Bureau of Census consider at all this Bureau of Immigration and Naturalization

figure of the number of illegal aliens apprehended?

A They have told me on repeated occasions they would not consider that and did not consider that.

Q Did they consider, in arriving at their figure for the number of citizens of voting age the prison or institutional population in Texas?

A They have told me that they did not exclude any convicted felons or lunatics within the State of Texas in their citizens of voting age computation.

THE COURT: What is the Texas law?

THE WITNESS: The Texas law is that lunatics, convicted felons, aliens and those persons under eighteen years of age are not permitted to vote.

THE COURT: When you say, convicted felons, do you mean Federally or state?

THE WITNESS: Either.

MR. ZWEINER: Either, as long as they have been convicted of a felony or a crime involving moral turpitude:

THE WITNESS: That also includes convicted felons in other states who move to Texas.

BY MR. ZWEINER:

Q Non-residents are not permitted to vote either, are they, Mr. White?

A That is right, non-residents.

Q Do you worry about this problem of non-residency with regard to the determination made by the Bureau of Census as far as citizens of voting age?

A Yes. It is a well-known fact, I think, that many of the military personnel stationed in Texas -- and Texas probably has the largest number of military persons stationed within its borders, within the state -- vote absentee in their home states and do not acquire citizenship for voting purposes in Texas.

Q Do you have a figure for the number of servicemen in Texas for the year 1972?

A I was informed by the Bureau of Census that that number would total approximately 166,000 people.

Q And they did not take this figure into consideration in any way in obtaining their figure for citizens of voting age; is that correct?

A I was told they did not.

THE COURT: Well, they include those people.

THE WITNESS: They were included, yes.

THE COURT: They were included as citizens of voting age because, a, they were citizens and, b, they were of voting age. Isn't that right?

MR. ZWEINER: That is true. However, Your Honor --

THE COURT: They decided to include them.

MR. ZWEINER: We are contending as a legal matter they should not be included. They are not really within the voting population of Texas. They don't vote there and they should not be included for the purposes of the Act.

THE COURT: I understand that, yes.

BY MR. ZWEINER:

Q Did they include non-resident students also in their figure?

A I am informed they did.

Q They do admit to a sampling error, don't they?

A The Bureau of Census, at the discussion I had with them on September the 5th, indicated that they did have a sampling error in their techniques for projecting numbers of aliens existing in the State of Texas at any time. I was also informed at that meeting that they would provide my office with that sampling error total.

Q They didn't know what the sampling error was at the time of the meeting, is that correct?

A They didn't have it available. They said they would make it available. They have not yet made it available.

Q Mr. White, for some purposes a five per cent figure is important when we are speaking of persons of Spanish heritage, is that not correct?

A Yes, sir. One of the determinations is those political subdivisions which have in their borders more than five per cent Spanish heritage population.

Q Now, is Texas treated differently in this regard than other states?

A It is my understanding, from a letter from Mr. Pottinger to Mr. Barabba, that Texas and two or three other states, Southwest states, are treated differently than the other states of the Union in computing Spanish heritage.

Q And that is explained in Mr. Pottinger's letter, which is attached to your affidavit; is that correct?

A Yes, it is.

Q Now, after your meeting with the Bureau of Census -- they, I believe, make initial determinations before the Attorney General is to act finally under the Voting Rights Act; is that correct?

A Would you state that again?

Q After your meeting with the Bureau of Census, did you seek a meeting with the Attorney General of the United States for a hearing on this question of Texas inclusion in the Voting Rights Act?

A I believe that I had made a concurrent request on August the 28th for such a hearing, yes.

Q Did you ever get a hearing?

A No, sir, I did not.

Q Did you ever meet with the representatives of the Attorney General's office?

A I did have one meeting, at which time there were members of other jurisdictions potentially covered by this statute that were present.

Q Was any testimony or evidence offered at that meeting?

A No, sir, there was no provision made for testimony or evidence or cross-examination.

Q Had you given the Attorney General --

MR. ZWEINER: Your Honor, I am a little handicapped in asking the questions since we haven't

had any argument. Mr. White is a lawyer.

BY MR. ZWEINER:

Q There is a determination that the Attorney General has to make with regard to a test or device to include Texas within the operation of the Act; is there not?

A Yes, that is one of the responsibilities under the statute.

Q And one of the test or device is the fact that the election is an English-only language election; is that correct?

A That is correct.

Q Is it your view that in making this determination the Attorney General must decide whether or not this English-only language election did have the effect of denying persons of Spanish heritage the right to vote?

A I think that was the purpose of the statute. It was to correct what ill effects a test or device might have, and if the test or device had no ill effects, then there would be no purpose in the statute and no purpose of inclusion of any voting subdivision under the sections of the statute.

Q Have you made any attempt to determine what if any effect an English-only language election has upon the persons of Spanish descent in Texas?

A The only test we have run -- and I think the only one that is particularly appropriate -- was to see how many people in Texas in those counties with great population concentrations of Spanish surnamed individuals actually voted, and to contrast those

counties against those other counties in Texas where almost no Spanish surnamed individuals reside.

Q You did make this comparison and study?

A Yes, I did.

Q What was the result?

MR. LANDSBERG: Your Honor, I object. I think the question relates to whether there has been discrimination rather than whether the determination of the Attorney General is correct. It is irrelevant.

MR. ZWEINER: Your Honor, it is our contention there are two things necessary to trigger the statute: The Bureau of Census must decide numbers to determine first whether a state is included within the Act, number of registered voters or number of persons actually voting; and secondly, there must be, to trigger the operation of the Act, a test or device which has been defined as an English-only election, which Texas has. We say that the Attorney General, in deciding coverage, also must determine whether or not that test or device, English-only election did result in discrimination; and further, whether or not this particular test or device that may have had some discriminatory effect, has been corrected. Whether there is, in effect --

THE COURT: There is no enforcement proceeding in front of me, is there?

MR. ZWEINER: No, Your Honor.

THE COURT: We are not concerned with the enforcement proceeding. Those are matters that would

come up on an enforcement order, wouldn't they?

MR. ZWEINER: That is true.

THE COURT: They don't come up here to me.

MR. ZWEINER: Your Honor, one of the reasons we are asking for an injunction here is Mr. White is going to face somewhere, as the election official of Texas, possible criminal prosecution.

THE COURT: Where do you find the criminal prosecution? I thought it was civil.

MR. ZWEINER: No, Your Honor, there are penal provisions in this Act.

THE COURT: There are penal provisions in this Act for what?

MR. ZWEINER: Well, they are for a number of things but there is a general --

Your Honor, this is not a copy that I am familiar with but there is the general Civil Rights Statute.

THE COURT: I understand the criminal provisions there.

MR. ZWEINER: He could be subject to that if he disobeyed some injunction that resulted from being included within this Act.

THE COURT: I also understand that.

MR. ZWEINER: Yes, sir.

THE COURT: That is what I said. That depends on an enforcement proceeding, doesn't it?

MR. ZWEINER: Yes, Your Honor.

Your Honor, I can finish up with Mr. White in about two minutes if you will permit this line of questioning for just a moment more.

THE COURT: Oh, certainly. I want to let you make your record, but I have some sympathy with the objection.

MR. ZWEINER: Yes, Your Honor, I understand. Thank you.

BY MR. ZWEINER:

Q I believe, if I am correct, that you took counties that had over fifty percent Spanish surnamed people and counties with under five per cent in making your comparison, is that correct?

A That is correct.

Q Did you find any significant difference in those counties in voter turnout?

A There was a seven per cent total difference between voter registration in those segments of counties or groupings of counties; and based only upon voter turnout, there was less than one-half of one per cent difference in voter turnout.

The thrust of this is that there was actually a higher rate of voter turnout in those counties with higher Spanish surnamed population than there was in those of almost no Spanish surnamed populations for the general election of 1974.

Q Thank you. What does one have to do to register in Texas, Mr. White?

A Assuming qualifications under the law, you may register to vote by filling out a piece of paper supplying

all of the correct information and mailing it to the voting registrar in the county in which you reside.

Q This can be done by mail?

A Yes, sir.

Q What has the State of Texas and what have you or any of your predecessors done to insure voter participation in Texas and to insure there is no discrimination between races?

THE COURT: Is that issue in front of me?

MR. ZWEINER: Your Honor --

THE COURT: I wish you would explain why it is in front of me. I don't view it in front of me.

MR. ZWEINER: Your Honor, we get to it in this fashion: The Attorney General, after he receives the information from the Bureau of Census, must determine whether or not a state is covered.

THE COURT: Yes.

MR. ZWEINER: In doing that, he examines the state and its political system to determine whether a test or device has been used.

In the State of Texas, he determined that such a device as defined by the statute has been used, English-only election, which we have been having for a hundred years. But the Attorney General must, we say, determine whether that device has been discriminatory; and even if it has been discriminatory, if the discrimination has been abated by state action, we say that there is no reason to include the state.

THE COURT: The statute gives you a bail-out provision.

MR. ZWEINER: Yes, Your Honor.

THE COURT: If that is the situation, you can institute a bail-out proceeding, as I understand it, and go to that.

All that has happened is to a degree there is a shifting of burden based on the statistical showing. Now, you have all the rights in the world to come in and bail yourself out.

MR. ZWEINER: That is true, Your Honor.

THE COURT: But this is not a bail-out case. I am not involved in determining whether or not there is discrimination in Texas. That is something that I wouldn't have scheduled a hearing for an hour or two. You schedule a month or two.

You have those rights under the statute which you can exercise.

MR. ZWEINER: That is true but we say that Congress, in passing the statute, must have intended for the representatives that it chose to enforce the statute to have acted on a rational basis and that these particular standards that I have just discussed are a part of that rational basis decision making determination that must be made. Otherwise, the statute would be unconstitutional.

THE COURT: If you have got a constitutional argument, the statute requires you to ask for a three-judge court; and you haven't done so.

MR. ZWEINER: I am not making that argument.

THE COURT: Except you are talking about constitutional interpretations of the statute; and that is for a three-judge court. It isn't for me.

MR. ZWEINER: That is true but we say Your Honor can decide that the statute if applied is constitutional; and that can be the function of Your Honor.

THE COURT: No, I won't do that. I don't intend to and I don't consider that before me.

MR. ZWEINER: All right, Your Honor.

THE COURT: The constitutional questions, certainly under this statute, are three-judge court cases, both as to application of the statute and as to its terms.

MR. ZWEINER: O.K., Your Honor.

THE COURT: Otherwise, we are just avoiding the clear intent of Congress that those matters should be determined by a three-judge court.

MR. ZWEINER: Your Honor, as far as bail-out is concerned, it would seem to conserve judicial resources it would be almost absurd for these particular factors we have been talking about not to be considered here because then we could move tomorrow, I suppose, for bail-out; and if the Attorney General is applying the statute improperly, I would think that Congress might have intended that that be determined here before one judge as we are doing.

Your Honor, I have one other question and it deals actually with what Texas has done to insure voter participation by persons of Mexican descent. If the Court will permit me to make that part of the record, I

will be through.

THE COURT: Yes, you may ask the question.

MR. ZWEINER: All right, Your Honor, thank you.

THE COURT: But with no thought that I am going to determine the question of discrimination.

MR. ZWEINER: O.K., Your Honor, thank you.

BY MR. ZWEINER:

Q What has Texas done to insure that persons of Mexican descent do get the opportunity to vote?

A Well, since 1972, under directive of the Secretary of State's office, there has been oral assistance given to any person who was not able to read a ballot as printed and from that date on --

THE COURT: So that in the November election involving amendments to the Constitution of Texas, somebody is going to talk to one of these individuals that can't read English and explain to them what the constitutional provisions are?

Now, really, there will probably be years of litigation as to what they mean after they are written in English and everybody thinks they can understand it.

You are not going to have a ballot now in Texas -- except for this action -- that is written in Spanish?

THE WITNESS: Oh, yes.

THE COURT: And all the terms of the constitutional provisions are going to be written out in Spanish?

THE WITNESS: Oh, yes.

THE COURT: And handed to all voters?

THE WITNESS: Yes, sir.

THE COURT: I was advised to the contrary when you came in on the TRO in chambers, that that would cost you $1,500,000, or something like that and you didn't want to do it.

That is what I understood was the thing that made you so concerned about this development; you didn't want to go to the expense.

MR. ZWEINER: Your Honor, we are perfectly willing to distribute these Spanish ballots and constitutional provisions to Spanish-speaking people that need them. But the Department of Justice, as I understand it -- is this correct -- wants us to submit them to every household in the State of Texas without regard of whether they are of Spanish descent.

BY MR. ZWEINER:

Q Is that correct?

A That is the suggestion which they said we would have to submit a very high level of evidence to overcome the burden of proof.

THE COURT: Well, that is in negotiation.

THE WITNESS: I think possibly I may have misled the Court or the Court did not understand my statement.

THE COURT: Assume the latter and explain it to me.

THE WITNESS: The directive of the Secretary of State's office that I mentioned was a directive issued by my predecessor in 1972, which provided for oral assistance in all elections for those persons who were unable to read the ballot for any reason.

Since that time, the State has adopted, in the past session of the Legislature, a bill, Senate Bill 165, which provides for Spanish-language registration and voting materials to be supplied to those counties which have more than five per cent Spanish surnamed individuals.

THE COURT: Yes.

THE WITNESS: That is a state law. In addition, in compliance with that law, the Secretary of State's office has been required by the Legislature to publish a document, a tabloid, explaining the new constitution as proposed. That tabloid is legislatively directed to be distributed to every residential household in the State of Texas.

That particular tabloid is in English. On the face of the tabloid is a Spanish statement which indicates how a copy of that tabloid in Spanish can be obtained, both by writing and by toll-free watch line.

In addition, our office has contacted members of Mexican-American community organizations within the community, the television, news and print media, to supply in Spanish this information of the availability of the Spanish tabloid.

In addition, we are asking various food markets and convenience stores to have these available in areas where they can be readily picked up by the people in our state who can best utilize them.

THE COURT: What is the problem that leads you

to want to come in and ask for a temporary restraining order? What are you concerned about with this publication that is coming? What troubles you?

THE WITNESS: The suggestion made is that our efforts do not comply with the statute even though we feel like we have directed sufficient resources to see that those persons within our state who can best utilize these Spanish-language materials have them readily available.

The suggestion was made, Your Honor, that we would have to submit one Spanish copy to every residential household in Texas. That would impose a financial burden of approximately a half a million dollars which, as this office does not have any source of funds, would require a special session of the Legislature which best estimates indicated in past sessions have cost a minimum of $2,000,000, no matter what minimum length of time they meet.

THE COURT: When the matter came on for TRO in chambers, before we set these proceedings down, there was an indication that the Department of Justice recognized that as far as your November election is concerned, given the shortage of time, that they were prepared to discuss with your people procedures which might not go to the absolute extent of the implications that you see in this action.

It was the Court's understanding that there was a disposition to recognize that the jump to total compliance, as Justice sees it, may not be possible by November 4. That issue is an issue as to money and how that can be resolved.

But from what you are saying, I take it the determination that you must have a bilinqual election

doesn't trouble the State at all because the State already has one.

Isn't that what you are saying to me?

THE WITNESS: Under state law, we feel like the bilinqual statute has been complied with. Under the Federal statute there are grave doubts. The Justice Department might impose guidelines that we would be unable to comply with under the Federal statute.

THE COURT: If you bail out under the bail-out provisions, that wouldn't be so. Having been triggered by the statistics, you bring an appropriate bail-out proceeding and satisfy the Justice Department of your good faith and compliance and those provisions wouldn't be applicable to you. Isn't that right? Isn't that what the statute contemplates?

THE WITNESS: I don't know that we have time for a bail-out suit between now and November 4.

THE COURT: No, I mean, long-range that is clear, isn't it? Long-range, that is what the statute contemplates.

THE WITNESS: Yes, sir.

THE COURT: All right, thank you.

MR. ZWEINER: Your Honor, I have no further questions.

THE COURT: You may examine, Mr. Landsberg.

CROSS EXAMINATION

BY MR. LANDSBERG:

Q Mr. White, you did meet with Mr. Pottinger and

members of his staff and other individuals on August 26, 1975 to discuss implementation of the Voting Rights Act; is that correct?

A I was in a closed meeting with those individuals, I believe, at which time there was no opportunity to even make a transcript of that meeting. I was not permitted to take any materials from that meeting.

Yes, I was in a meeting.

Q And that meeting lasted about four hours; is that correct?

A I think that is true, yes.

Q At the meeting, the main topic of discussion was interim guidelines that the Department of Justice was fashioning to help states cope with the difficulties caused by the timing of the Act passing in August, the determinations being made in September and the election being held in November; is that correct?

A That was the purpose that I was informed of when I arrived at the meeting.

Q At the meeting there was discussion of alternative means of complying with the statute besides furnishing a copy of the new constitution in Spanish to every household; is that correct?

A Let me preface this. My attendance at the meeting was what I thought was an indication by the Justice Department to offer a hearing that had been requested on the threshold matters involved in the determination of whether or not certain factors existed in Texas and also to express our position concerning the interpretation of that statute.

Only after arriving at the meeting did I know the subject matter was not to be that hearing that I had requested. The matters that were discussed I think were discussed, you know, on the subject matters you suggested.

Q Now, at the meeting which you held with the Bureau of the Census, do you recall that at that meeting you mentioned that the Census Bureau had on the previous day issued a press release?

A Yes, I sure did mention that.

Q And Mr. Zitter --

THE COURT: I am sure you did.

BY MR. LANDSBERG:

Q Mr. Zitter stated to you that the purpose of the meeting was to see whether you had any materials that would help the Census Bureau make its determination and that he stated that: There is nothing we have put out yet that precludes us from making changes.

A I was also led to believe there would be no issuance in the Federal Register until certain events had taken place that had been offered by the Bureau of Census.

Q Mr. Zitter stated also that the notifications in the Federal Register will be next week, is that correct?

A He indicated that we would receive information on sampling error before any publication in the Federal Register would be made.

Q I don't think you have responded to my question.

A Yes, he did say publication in the Federal Register would be late next week and that publication

came on Tuesday after our Friday meeting.

Q He also said that the purpose of the meeting was to determine whether you had any additional information that might change the determination of the Director?

A I have not --

MR. LANDSBERG: May I approach the witness, Your Honor?

THE COURT: Yes.

(Whereupon document was submitted to the witness.)

BY MR. LANDSBERG:

Q Mr. White, were you allowed to record that meeting?

A I was permitted to record this one. The Justice Department had some reluctance on me recording the meeting in their office.

Q You made a transcript of the tape recording, is that correct?

A This was an effort on the part of our staff to try and transcribe that.

Q I am referring you to that transcript now.

A I would be glad to read it, if you like.

Q All right. That paragraph (indicating).

A All right.

"Zitter: That as I see, my purpose here today is to see whether there is any materials you have that would

help us decide and to make a determination is, that is, basically, the population estimates and making a determination of the per cent voting should be given from what we came up with and there is nothing that we have put out yet that precludes us from making changes. This is a press release of our findings. The notifications of the Federal Register will be next week."

Zitter later says:

"Towards the end of the next week, even if it goes in the Register, if we find that on the basis of evidence that our arithmetic is wrong or there is a better set of data available, we are not precluded from making changes but, you know..."

Do you want me to quit?

Q Yes, sir.

Mr. White, prior to the passage of the Texas Bilingual Election Law, were there any Spanish-language ballots in Texas?

A Not to my knowledge. You are talking about the Texas Bilingual Law, right?

Q Yes, sir.

A That is correct. That law, when passed, had immediate effect; and since that date there have been bilingual ballots in every election in Texas covered by the statute.

Q In the November 1972 election?

A No, there were none. There was no legal or Federal requirement of any of that.

Q What is the triggering mechanism of the Texas Bilingual Election Law?

A Triggered by a political subdivision which has, according to the 1970 Bureau of Census population figures, a Spanish surname population of five per cent or greater.

Q That includes population of prisioners and military aliens, is that correct?

A The statute talks of population of Spanish surname as determined by the Bureau of Census 1970 figures; and that is the decision that was made to trigger coverage of that statute. It has no relationship to citizenship and makes no reference to citizenship in the statute.

Q The vote totals which you referred to in Mr. Zitter's affidavit of the vote in Texas in the November 1972 election were furnished by your office; is that correct?

A Yes, I think that is substantially the correct number. It seems like every time that question is posed there may be three or four votes changed but no more than that.

Q Does that figure include absentee ballots of Texas students and Texas military personnel who are temporarily out of the State?

A To the extent that they vote in Texas, it should include that number.

MR. LANDSBERG: I have nothing further.

THE COURT: Anything further?

MR. ODAM: No, Your Honor, not on this witness.

MR. KORBEL: Your Honor, I have a couple of questions, if I would be allowed to ask them. Very short.

THE COURT: I hadn't anticipated you would engage in questioning, not being a party. You can bring any matter to my attention later in the way of argument. I want to hear you on argument.

MR. KORBEL: Thank you.

THE COURT: Thank you very much, Mr. White.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

THE COURT: Will you have any other testimony?

MR. ZWEINER: We have no further testimony, Your Honor.

THE COURT: Are you going to have any testimony on your side, Mr. Landsberg?

MR. LANDSBERG: No, Your Honor.

Mr. Zitter is here. We understand the Court to have received his affidavit.

THE COURT: I have taken his affidavit.

MR. LANDSBERG: Yes. I would merely like to point out a minor factual error in his affidavit.

THE COURT: Then I need mine back. Somebody took mine from me a while ago. I want to correct the actual affidavit.

Mr. White, may I have it? Thank you.

Yes?

MR. LANDSBERG: On the first page of his affidavit, he states that he served in various capacities in

the Population Division for twenty-seven years. The correct number should be twenty-four.

THE COURT: I take that not to be a material change.

All right, then we will go to a discussion of the issues on the record that we have. The record is closed on both sides; is that correct?

MR. ODAM: Yes, Your Honor.

THE COURT: Agreed, Mr. Landsberg?

MR. LANDSBERG: Yes, Your Honor.

THE COURT: All right. I will be glad to hear you, gentlemen.

MR. ODAM: May it please the Court, my name, again, is John Odam.

It is the Voting Rights Act of 1965, Your Honor, which we have been discussing today by way of Mr. White's testimony, with its most recent amendments, with the amendments signed into law August 6.

We are here today, in our opinion, to focus on two very narrow points of law. They pertain to Title 2 of this Act. That is, number one, the initial determinations that are to be made under Section 4 of Title 2 by the Director of the Bureau of Census and by the United States Attorney General.

As this Court is aware, under Section 4, before the Act can apply to the state, as brought out in this testimony, these two determinations must be made: I will not go into any great detail but, generally, the first being the test or device that would have to be determined by the Attorney General; and second of all,

the additional determination to be made by the Director of Census, less than fifty per cent of the citizens of voting age were registered on November 1, 1972 or that less than fifty per cent of such persons voted.

The section further states that once these determinations are made and become effective by publication in the Federal Register, they are not reviewable in this or any other court.

As I said, our position is quite simple: First, that before these officials can make these determinations, they must hold public hearings and consider all relevant testimony and evidence.

The evidence, by way of Mr. White's testimony thus far, has indicated this was not done. As Mr. White indicated, he attempted on numerous occasions to request formal hearings to present evidence by way of testimony and other written information that he had available.

If the non-judicial review of the law is to stand, then clearly a determination must be made by the Director of the Census Bureau that is not arbitrary, that is not capricious and unreasonable.

We consider, Your Honor, that a determination that must be made under this Act must be a determination made in consideration of all the relevant testimony.

The Court asked the question earlier of Mr. White, or of Mr. Zweiner, rather, he must make a determination. This is certainly true. That determination must be made but it is our position, Your Honor, that when that determination is made, that determination must take into consideration all of the relevant evidence. And I believe that Mr. White's

testimony indicated that, obviously, certain data was not taken into consideration.

That brings up the second portion of our case; and that is the construction that is necessary for the benefit of the Justice Department or for the benefit of the Director of the Census Bureau as to whether or not they should take this into consideration.

For example, Mr. White would want to present evidence on the number of illegal aliens, the number of students, the number of military, to the extent, as indicated, whether or not Texas has discriminated in the past. This was not accepted. The reason for this, as we understand it, is because the counsel for the Director's office advised him that they were not citizens of voting age.

It is our position that when this Court looks at the term, citizens of voting age, and when the Director's office looks at, citizens of voting age, you must consider and they must consider citizens of voting age who have a right to vote.

In this most recent amendment the word was used, "citizen" rather than as in the latter portion of the Act that contains, "person." Now, this must have a meaning, as indicated by the testimony and by the affidavits and by the Justice Department's admission they would certainly realize that legal aliens should not be counted in counting the number of citizens. Why? Obviously, we know why. Because they are not citizens under our laws.

They say they would not count illegal aliens, not attempt to count illegal aliens, because it is too difficult. As the Court indicated earlier, yes, illegal aliens move in and out. But the point they make, no attempt has been

made, as we see it, to determine and make an estimate as to these illegal aliens.

The second portion is again an interpretation and construction of this statute with regard to the citizens of voting age; and it calls for interpretation of what we mean by citizens of voting age.

If the purpose of this Act is to protect voting rights, which, obviously, we in the State of Texas want to do, you must look to see whose rights are being protected.

Why would a determination need be made as to how many people there are in Texas who have no right to vote in Texas? If you are making a determination as to whether or not fifty per cent voted or whether or not fifty per cent registered, then clearly, you would look at those people, in our opinion, who have a right to vote in Texas.

THE COURT: You mean who registered?

MR. ODAM: Those who have registered, yes, Your Honor.

THE COURT: Well, we have known situations where a lack of registration reflected discrimination right there; haven't we?

MR. ODAM: Yes, Your Honor.

THE COURT: The broad scope of the Act went beyond that, didn't it?

MR. ODAM: Yes, Your Honor.

THE COURT: That is why I have trouble with that argument.

MR. ODAM: Well, the point is, we believe, Your

Honor, in making the determination, that you cannot take as the total amount of persons counted, the fifty per cent of the total amount to include persons who obviously will not be able to vote in Texas.

Now, again, maybe this comment that I make is not responsive to your concern. Maybe I will again try to respond to the Court's concern.

THE COURT: Well, you would say that if the felons, for example, incarcerated in Texas Federal or state penitentaries are not able to vote because of Texas law which carries over to Federal law, that they shouldn't be taken into account?

MR. ODAM: That is correct, Your Honor.

The same with respect --

THE COURT: Or lunatics or people like that.

MR. ODAM: The same with respect to students who have no right to vote in Texas. Again, because if you look at the entire Act --

THE COURT: They have a right to vote in Texas. Some of them have chosen not to.

MR. ODAM: That is correct. If, as a matter of law, the Justice Department and the Director of Census make no attempt to decide how many students there are, then that issue is never raised. In other words, as of right now, unless this Court determines otherwise and gives instructions that you will at least make an attempt to determine how many students there are, they will continue to count the noses, to use the phrase the Court used earlier.

Simply, our position is if two determinations must be made which are not subject to review, as to the total

number of citizens that would put Texas under this Act, then that determination must be made with respect to or at least try to determine how many citizens or how many people in Texas of voting age have a right to vote.

In other words, the Director should at least make an attempt to estimate how many of these there are. Perhaps these estimates that would be made in arriving at this determination would then be the factual evidence.

As the Court indicated in chambers the other day, we would not perhaps want to get into or perhaps would be prohibited from getting into challenging whether or not their estimates are right at a later point. But I feel at this point they simply take the legal position that they will not count aliens, legal or illegal, and will not count the others.

If we were at the point of determination in this Court of a determination that became effective, I think at that point those estimates could perhaps not be challenged; but the thing that could be and is being challenged today -- at least a legal determination -- is whether or not those citizens should be counted.

THE COURT: To put it another way, whether or not Census has correctly, or at least not arbitrarily, rationally interpreted the statute.

MR. ODAM: That is correct, Your Honor.

THE COURT: And you say that in spite of the non-reviewability provision of the Act relating to Census publication, that the Court has jurisdiction here, because this is a genuine controversy and because it is a Federal question, to determine that at least pre-publication.

MR. ODAM: Oh, yes, sir, definitely.

THE COURT: And that the non-reviewability provision did not take away the jurisdiction of the Court to interpret the meaning of Congress in the abstract at least.

MR. ODAM: Yes, sir, that is exactly what we are saying. I don't think that we reach the point necessarily today of the phrase, that once the determination is made and becomes effective, it is not subject to review. We are not quite to that point yet because they haven't made at least the next determination of citizens of voting age.

I do think this Court does have the jurisdiction, as we discuss in our brief, to make the legal determinations and give directives by way of a Court order, for example, by way of a temporary injunction or preliminary injunction order, that the Director of Census and the Attorney General be preliminarily enjoined from making the determinations and publishing them and making them effective until such time as they consider how many aliens there are, how many NCM's, how many students, and so forth.

THE COURT: Let me ask you this, which is an aspect of this which concerns the Court.

The legislative history is all over the lot with this statute, like many statutes of this kind, with a large number of people interested in many hearings. If you dig into it deep enough, you could prove almost anything or at least give a suggestion of almost any result.

Is it not reasonable to assume that Congress left to the expertise of the Census Bureau the job of making these determinations based on its experience and that all that Congress was doing was not saying that these

determinations are absolute in the sense that once they are made they are not subject to appraisal as to their weight and significance; but they said, where these determinations are rationally made, then the burden shifts, in this case to the State of Texas, to come forward and demonstrate that the elections in the State have not been inconsistent with the purposes of the Act; and that all we are talking about is something that starts the process and shifts the burden.

Certainly with a bail-out provision, there is nothing in the statute that says that regardless of the figures, if the current practices are adequate to meet the requirements of the Act, that enables you to bail out, whatever the history may have been at the time the figures were prepared.

So the figures are simply, as counsel called it, a triggering mechanism to get the process under way.

Isn't that a rational approach to the statute; and if not, why not? I take it you don't think it is.

MR. ODAM: No, sir, I would agree with what the Court says and I think the key word that I think the Court inserted, and which we think is at this point very crucial to our case, is the word, rational. Not the rational way to consider your argument but the rational determination they must make.

Our position is, a rational determination, as you stated, was intended to be made by Congress by the Director of the Census Bureau, a rational determination cannot be made if as a matter of law they consider certain groups of people; and, second of all, a rational determination cannot be made if they will not attempt to seek out and obtain evidence as to how many citizens those are.

THE COURT: You mean it isn't rational for Census to rely on its own figures and that it should read Saxbe's speeches?

What about that? That is one of the arguments that was presented to me by your witness. I don't understand why it isn't rational. I don't mean to do more than point out that perhaps Census says: We are going to go on our own records and nobody else's. That is why Congress intended. We are not going to look at Immigration. We are not going to look at what Texas says. We are not going to look at what Saxbe says. We are going to look at our own records. We have the job. We were given the job by the Congress and we are going to go on our own records.

Isn't that a rational view?

MR. ODAM: Yes, sir, but before you reach that point, I think part of the reason we are here is for this Court to clarify to the Director whether or not he should consider as a matter of law as citizens of voting age these groups.

If this Court were to decide, yes, sir, you would consider as a matter of law citizens of voting age includes aliens, NCM's, felons, and so forth, then perhaps what you are stating is so, they can look in their desk drawer, look inside their own office and make that determination.

First of all, as a matter of law, this Court should clarify whether or not they should consider exclusion of those groups of people. That is what we are asking for this Court to clarify.

THE COURT: I think that is well stated counsel and I think that is correct. These arguments become very circular. How am I to determine that, by the

language of the statute?

MR. ODAM: The language of the statute.

THE COURT: They have taken, citizens of voting age, haven't they?

MR. ODAM: Sir?

THE COURT: They have taken, citizens of voting age.

MR. ODAM: They have taken citizens of voting age.

THE COURT: Lunatics and felons are citizens of voting age.

MR. ODAM: But they are including citizens of voting age who do not have full citizenship rights. Again, it calls for an interpretation of the statute and the purpose of the statute.

Again I come back to the point I made earlier, if the purpose of the statute is to be triggered because a determination has been made that less than fifty per cent of the population did not vote, then it is our position that Congress intended that you consider, just like when they use the word, "citizen," that you look to the number of persons who have voting rights in Texas. Those are persons whose rights are intended to be protected.

THE COURT: There is nothing before me that suggests even if your interpretation and figures were accepted, the results wouldn't be the same. I have no evidence here at all that if all your interpretations were accepted, you would have a different result.

MR. ODAM: That evidence could be presented to this Court.

THE COURT: It hasn't been. The record is closed.

MR. ODAM: If this Court were to state the determination must be made considering exclusion of these groups, we would suggest that that determination could be made by the Director of the Census Bureau. It is not published in final yet.

In other words, this Court could say: Director of the Census Bureau, Mr. Barabba, you made your determination but I am directing you as a matter of law in making your determination you, when considering citizens of voting age, will take into consideration evidence of how many groups of these people should be excluded.

Mr. White could present evidence at that hearing, at that determination; and we would say at that determination Texas would not be under the Act.

No, we did not put on a full portion of evidence to show that if all these figures were presented -- because we think that the first point is whether as a matter of law in making the determination, the Director of Census should include or exclude these persons in Texas who do not have full voting rights.

THE COURT: So that is something that really is to be determined without regard to the figures from a reading of the statute, the language of the statute.

MR. ODAM: From the reading of the statute, we believe. As I said earlier, the first portion of the statute spoke in terms of, persons. I would say, looking at the earlier portion that was admitted, persons, that is everybody, that is the nose of everybody in Texas over voting age. But when they amended it, they said, citizens. I think the Court can say, they intended,

citizens, not everybody.

THE COURT: How can I say they meant citizens of Texas?

MR. ODAM: I think that the Court would have to say that the purpose of this statute is obviously to protect the voting rights. It protects the voting rights of those persons in Texas entitled to vote. Therefore, when looking at the phrase, citizens of voting age --

THE COURT: I think there is a larger purpose to the statute, isn't there, and that is to encourage people to vote wherever they are, whenever they want to.

MR. ODAM: Yes, sir. But I do not think --

THE COURT: Who has and who hasn't isn't the whole test.

MR. ODAM: Well, who does not have the right to vote, who cannot under the law vote in Texas, those persons, we believe, were not intended to be protected.

I am talking about the NCM's; I am talking about the illegal aliens.

THE COURT: I have that in focus.

MR. ODAM: As I said, the two main issues, then, would be whether or not as a matter of law in making this determination -- as the Court stated, it must be rational. It is our position that, yes, that determination by the Director and by the Attorney General must be a rational determination. In making that rational determination, the Director must take into consideration all of the evidence with respect to determining how many citizens of voting age there are.

That is the first legal issue; whether or not he must

inquire, must have a hearing, and so forth.

The second issue before the Court is a matter of statutory construction, in giving advice and counsel to the Director of the Census Bureau, as to whether or not, in making that rational determination, he is to include a count of all the people in Texas or whether or not he should exclude those citizens in Texas, those persons in Texas who do not have full voting rights.

It is our position that, number one, he should not include those persons who do not have full voting rights. That was not the intent of the entire Act and it was not the intent of this revision. Second, once that determination is made, he should exclude those persons. Then, of course, to make a rational determination of who he is going to count, he should take into consideration the evidence presented of how many of those persons should be excluded from the total population that he would come to by Census count.

THE COURT: I think that is a very clear statement of your position. I do believe, from the briefs, I have it in focus. You have been very helpful, as has Mr. White.

I will give you a chance to respond unless you have something else you want to tell me now, after I hear from the Justice Department.

MR. ODAM: No, Your Honor. Thank you very much.

THE COURT: All right, Mr. Landsberg.

MR. LANDSBERG: Your Honor, I first wanted to address the question of the reviewability at this stage or at any stage of the determinations of the Director of Census and the Attorney General.

The statute specifically --

THE COURT: Now, wait. I need your help. Is it a question that I am being asked to review the determinations or rather is it a question that I am being asked by declaratory judgment to interpret the language of the statute?

You say I have no jurisdiction to do the latter?

MR. LANDSBERG: Your Honor, as we read the statute, that is correct.

THE COURT: It is one thing reviewing computations and figures, and another question as to whether a Federal Judge does not have, absent an express statement by Congress that the judge doesn't have that power, the power to interpret statutory language in a Federal statute.

MR. LANDSBERG: I think that that question might depend upon whether the determinations are rational or whether they are capricious.

THE COURT: No, that is the result. The initial jurisdictional question is, do I have power. Do you acknowledge or not acknowledge that I have power to interpret the statute by declaratory judgment?

In other words, the other side has cited a number of cases. They got their lead out of Page 333 of the South Carolina v. Katzenbach case, and refer, among other things, to United States v. California Eastern Line, and Switchmen's Union, and some of the other cases which seem to say that a judge has the authority to interpret the meaning of a congressional statute which the Executive has undertaken to interpret.

MR. LANDSBERG: But those statutes did not

specifically preclude judicial review, with the sole exception, I believe, of Leedom v. Kyne. In Leedom v. Kyne --

THE COURT: Where does this statute preclude judicial review?

MR. LANDSBERG: It states that the determinations shall not be reviewable in any court in Section 4(b).

THE COURT: That isn't preclusion of judicial review, is it? That says, once the determinations are made, the Court can't quarrel with the figures.

MR. LANDSBERG: Well, Your Honor, between the figures and the methodology, or the basis for the figures, I think is a very difficult line to draw.

THE COURT: It is. But I was focusing with you on the question of whether it was the Government's position that the Court had no authority to say what the language of the statute means. I wondered if your position was the Court didn't have that authority?

MR. LANDSBERG: Well, stated that way, Your Honor, it is difficult to --

THE COURT: That is the issue, isn't it? That is the issue Texas puts to me. They say the statute means this and the Executive says it means that, and we want you to declare who is right.

MR. LANDSBERG: I think that the Congress did not intend for the determinations or the standards by which the determinations were made to be reviewed by any court. I believe that is what the statutory language means.

THE COURT: Then you would say that as long as

the interpretation is rational and consistent with the purposes of the Act, that Census has a somewhat ambulatory authority to take those terms and give them such meaning as it thinks appropriate for its determination and the Court cannot interfere.

MR. LANDSBERG: That is correct.

THE COURT: All right. But I have to look at it, don't I, to determine at least whether it is rational and consistent with the purposes of the Act?

Suppose they said: We are only going to count for this statistical determination Chinamen in Texas. So they publish figures based upon the Chinese population of Texas. You would have some difficulty with that.

MR. LANDSBERG: I think a [illegible]ition like that would be so far outside the bounds of reason --

THE COURT: So irrational.

MR.LANDSBERG: That is right.

THE COURT: I am not suggesting anybody would think of doing it but that would be so irrational a Federal Court could intervene, couldn't it?

MR. LANDSBERG: Yes, Your Honor.

THE COURT: You see, I have made clear what is in my mind about this. I have to take what Judge Leventhal in one case said is a peek at the situation to at least assure myself that it is rational and consistent with the purposes of the statute, right?

MR. LANDSBERG: I think we welcome you taking a peek.

THE COURT: I am being quite serious about this.

MR. LANDSBERG: I understand, Your Honor. I am, too.

THE COURT: This is a very difficult problem for a Federal Court, particularly in the light of the statute language of what the scope of the Court's authority is. The Court must be deferential to the congressional purpose, will and statements but I would think that you, for the Government, would have to take the position that the Court must at least ascertain that the determination was rational and consistent with the statutory purpose.

MR. LANDSBERG: Well, Your Honor, I think the additional question arises as to when -- assuming a court could ask that question -- the court may ask it. Because as we read the purpose of the statute, it is to shift the burden, to say that once the determinations have been made, the burden shifts to the jurisdictions to demonstrate that they should not be covered, either because, as the State of South Carolina attempted to show, in South Carolina v. Katzenbach, the statute is unconstitutional. The State of South Carolina was under the Voting Rights Act for a period of seven months while the Supreme Court was considering that case.

THE COURT: Is it your view that in a bail-out proceeding the state can demonstrate that the current statistics, so to speak, are different than the findings in the publication by the Bureau of Census?

MR. LANDSBERG: Well, the issue in a bail-out proceeding is whether the use of a test or device was discriminatory, had a discriminatory purpose or effect. I think that the statistics might be relevant to showing whether there was a discriminatory purpose or effect. But I don't think there was any direct review --

THE COURT: Or to the fact that there was a device.

MR. LANDSBERG: I think in order for a device to have a discriminatory effect, there has to be a device.

THE COURT: It would be open in that hearing to challenge these figures in the sense they would say the current figures are different than the Bureau of Census has declared.

MR. LANDSBERG: The current figures would not be at issue in a bail-out suit because the issue in a bail-out suit relates to the year 1972 or relates -- the question in a bail-out suit is whether under the language of the new statute in the past seventeen years a test or device has been used with a discriminatory purpose or effect; and if at any time during that span a test or device has been so used, then the state is not entitled to bail out. That is the language of Section 4(a).

THE COURT: Even though it is not discriminating at the present time?

MR. LANDSBERG: That is right. That was one of the complaints raised by some of the Congressmen in the hearings on the latest amendments.

THE COURT: That is an issue as to constitutionality, obviously.

MR. LANDSBERG: Yes, it is, Your Honor.

THE COURT: All right. Excuse me for interrupting. You have helped me.

MR. LANDSBERG: I think it is important to emphasize that this burden shifting, this method of triggering was designed to eliminate judicial delays which the Congress found had occurred in the past, that the voting rights of citizens should be guaranteed according to the provisions of the Act while the

litigation was going on. A pendente lite kind of a concept.

That is really the extent of what I had to say about reviewability.

I would like to turn briefly to the question whether the determinations or the methods which are being used in making the determinations are proper, reasonable, whether the evidence shows that the Census Bureau is discharging its obligations correctly.

As we see it, there seem to be two types of claims made here. The first claim is that the Census Bureau is counting in as voting age citizens people who are aliens. That presents a factual issue, not a legal issue, in our view. Has it been shown they are or has it not?

Mr. Zitter's affidavit reflects that in making his determinations, the Director of the Census must necessarily start with the information provided by the Census forms, themselves.

The Census form has a space on it to show whether a person was born in this country or, as to persons not born in this country, whether the person was a naturalized citizen. There literally is no other reliable tool available to Census.

The Census Director has to then project to 1972 the results of the 1970 Census, just as under the 1965 Act and the 1970 Act the Director had to project to 1964 and 1968 from the 1960 Census. He cannot go back to 1972 and survey now what the facts were then.

The change that Congress made in the formula this time, the critical change here is the change from voting age population to voting age citizens. The Congress knew that this would necessitate the Bureau of

the Census making recourse to the questions in the 1970 Census.

I would like to point out, parenthetically, the State, itself, relies on the 1970 Census in its Bilingual Election Law, not with reference even to citizens but just to inhabitants.

The record shows that Census did subtract from the voting age population 140,000 persons who are identified as aliens. We believe on the facts the arithmetic is against the Plaintiffs. As we have computed it in our brief, I believe, in order to change the determinations that less than fifty per cent of the voting age citizens voted in the 1972 Presidential Election, the Plaintiffs would have to show that 565,000 persons of voting age counted as citizens were actually aliens. Since most aliens in Texas are of Spanish heritage, that would mean that over two-thirds of the 865,000 persons classified by Census as voting aged citizens of Spanish heritage would have to be aliens in order for Texas to prevail. We think that there is just no credible basis to suppose that two-thirds of the Mexican-Americans in Texas are illegal aliens.

As to the legal issues which are raised concerning the interpretation of the Act, we believe that they are addressed to the wrong forum. They have been considered in the Congress and the Congress has defeated amendments designed to bring about the interpretations which are sought.

Congress rejected the idea that a formal administrative hearing should precede the determinations. That was proposed by an amendment to the 1965 bill. Congress approved the reliance on estimates. Congress rejected the idea that students, military personnel, felons or citizens of unsound mind

should be excluded from the statute.

In that connection, I want to clear up what may be a little confusing in an attachment to our brief, Your Honor. Attachment 4 to our brief is Appendix L from the Senate Report on the 1965 Act and it computes the voting age population --

THE COURT: Which attachment is that, again, please?

MR. LANDSBERG: Number 4.

THE COURT: 5 is the last sheet. 4 begins --

MR. LANDSBERG: It should be a page that says, Appendix L. Page 52 of the Senate Report.

THE COURT: Yes.

MR. LANDSBERG: That table computes the voting age population by subtracting aliens and persons in military service. At that time the Senate Bill contained a provision stating that persons in military service should be subtracted. That provision was dropped from the Act as it was finally passed.

Congress clearly intended to cover states where less than fifty per cent of the voting age citizens voted. It did not allow reliance instead on what per cent of registered voters voted.

I think the quotes from the legislative history and from the case law in our briefs are compelling on that point.

Congress specifically made the definition of, test or device, retroactive, just as it had done in 1965 and 1970. Congress required the Attorney General to make his determination whether a test or device had been

used in 1972. It did not allow the Attorney General to not make a determination if it was shown that there was no discrimination. Instead the statute says that in this kind of a circumstance, the Attorney General shall consent to judgment in favor of the Plaintiff in a bail-out suit.

Now a new argument, I believe, has been raised relating to the use of the Spanish heritage figures rather than Spanish origin.

There are several different identifiers which the Census Bureau uses. In that regard I would merely refer the Court to Congressman Edward's description of how the determinations were to be made, which appears at Page H-4716 of the Daily Congressional Record.

Persons of Spanish heritage are identified as persons of Spanish language in forty-two states and the District of Columbia. Persons of Spanish language as well as persons of Spanish surname in Arizona, California, Colorado, New Mexico and Texas; and persons of Puerto Rican birth or parentage in New Jersey, New York and Pennsylvania.

Congressman Edwards was the Chairman of the House Subcommittee and the leader of the debate in the House.

Your Honor, for the above reasons, we would urge the Court to deny the interlocutory relief that has been sought and to grant our motion to dismiss or in the alternative for summary judgment.

THE COURT: Thank you.

Now, how much time would you like, sir?

MR. KOPBEL: About two minutes, Your Honor.

THE COURT: You have got five; so we are all set.

I don't mean to cut you off. I just wanted to be sure what you had in mind.

MR. KORBEL: George Korbel, representing the Defendant Intervenors Reyes, et al.

Your Honor, first of all, I would like to point out a couple of things which the Court may be interested in.

Texas relies extensively on the United States Federal Census. I checked yesterday and found at least two articles of the Texas Constitution, three articles of the Texas Election Code, and eighteen other miscellaneous statutes in Texas which rely on the Federal Census.

So it is not as if they haven't used the Census before and aren't familiar with it.

Secondly, Your Honor, we feel that what Congress was intending to do in this case was to focus on the electoral problems in the areas which they had testimony on; and I think the testimony on Texas is all over the record. It is not as if Texas was swept in as an innocent bystander here.

For example, in the thirty-eight pages in the House Committee's report, Texas or its subdivisions are mentioned forty-seven times. Judicial cases holding Texas' statutes unconstitutional or criticizing Texas' electoral methods are mentioned and cited at least twenty-three times. That is more than any other state in the Union. Texas is mentioned more than any other state of the Union and its judicial decisions are referred to more than any other state of the Union.

THE COURT: I guess it is the biggest state.

MR. KORBEL: In terms of area, we are second. In

terms of population, we are far down the list.

THE COURT: What is the biggest state, Alaska?

MR. KORBEL: Yes, I believe that is correct.

THE COURT: I keep forgetting Alaska.

MR. KORBEL: Finally, we would like to say that the nub of Texas' argument, it seems like to me, is that they will have no recourse if this Court doesn't issue the injunction.

Of course, they have the bail-out procedures. I think that is what Congress intended them to look to and we certainly expect them to look to that.

That is all I have to say, Your Honor. I would like, however, to straighten out our position in this case.

Am I to understand if Your Honor decides not to grant the Government's motion for summary judgment that then Your Honor will take under advisement our motion to intervene as parties defendant?

THE COURT: If these proceedings continue beyond today, then I think we should deal with your motion, just as we would any other motion to intervene, in normal course.

MR. KORBEL: Fine.

THE COURT: If they terminate today because of some ruling of the Court, then I am treating you as amicus and not as an intervenor.

MR. KORBEL: Fine, thank you, Your Honor.

MR. ODAM: Your Honor, if I might, I would like to yield my time for closing comments to Mr. Rhyne, co-counsel.

THE COURT: Certainly. I am glad to hear from Mr. Rhyne.

MR. RHYNE: Thank you, Your Honor.

No matter how much confusion there is in the record in this case about what all the statistics mean, there is no confusion at all about the groups that the Defendants were asked to exclude from their determination of citizens of voting age and which the Defendants have refused to exclude.

The Court can rule on whether it is proper as a matter of law to exclude those groups in construing the statute.

The Defendants here point out that in the 1975 the legislative history to specify the particular groups, military, non compos mentis, and so on, from the statutory citizens of voting age statutory term, does not preclude the exercise of this Court's duty to construe the Act in a rational way to save the Act.

The Act is not triggered, Your Honor, except on finding of a test or device; and in Section 4(d) of the Act, definitionally, it is impossible to have a test or device if there is a demonstration to the Attorney General that any test or device has been cured by subsequent remedial measure or lack of effect.

That is definitional. That is a jurisdictional fact that this Court can find and this Court should retain jurisdiction until a proper finding can be made by the Defendants on this Section 4(d) point, Your Honor. Especially where in defining the five per cent to constitute a test or device, the statistics were not determined according to lawful criteria.

The example was given, Your Honor, about the

application to forty-two states of the Spanish language definition for Spanish heritage; and the application to the State of Texas, and a very few others, of Spanish language plus Spanish surname.

That test, Your Honor, includes everyone with a Spanish surname who speaks good English in Texas. They are now found to be the persons for whom the Voting Rights Act was intended to produce Spanish ballots.

There is no rational explanation for that, Your Honor, no reason given, no matter what the Congressional record says by way of fiat that that is the way it is supposed to be.

It is true that the Voting Rights Act is designed to shift the burden to the states to defend their action. But 4(d), Your Honor, is definitional. That shifting of burden should only be done on a rational determination, according to the terms of the Act.

The application of Sections 4 and 5 of the Voting Rights Act is a tremendous burden. For example, the City of Richmond hasn't had a councilmanic election since 1970 because of a bail-out suit that is still going on. It was remanded by the Supreme Court this past term and back in this District Court before a special master, not even before the Court. That is a case where the Attorney General lined up on the side of the city. The Attorney General wanted a consent judgment.

THE COURT: What am I to draw from that?

MR. RHYNE: That there is a tremendous burden.

THE COURT: Apparently there were a great deal of problems in that lawsuit.

MR. RHYNE: That the Voting Rights Act is a tremendous burden that shouldn't lightly be invoked, Your Honor, only that. That the Defendants should make more showing than they have made in this Court to justify that burden-shifting trigger.

Your Honor, there is another way out of this that hasn't been discussed fully here. Since there is such a statistical quagmire here, there is one other part of the Act that is amenable to a fair construction in favor of the State of Texas, and that is the statutory language in the newly-amended Section 4(b) that includes the coverage of the Voting Rights Act and defines the coverage:

> Shall apply in any state or political subdivision of a state which, (1) the Attorney General determines maintained on November 1, 1972 any test or device and with respect to which (2) the Director of the Census determines that less than fifty percent of the persons of voting age were registered on November 1 of '72 or that less than fifty per cent of such persons voted in the Presidential Election of 1972.

Your Honor, I should point out that in this Committee print appended to the Defendants' brief apparently there is a typing error because it talks about, persons of voting age, and in the slip law it talks about, citizens of voting age. I think, citizens, is the proper term.

But a fair reading of that statutory language, Your Honor, is that the Defendants should determine whether fifty per cent of some group called citizens of voting age were registered, and then should consider and determine whether fifty per cent of that registered group voted.

The application of that test, Your Honor, would protect registrants, would cover the registration process, and it would cover the voting process.

THE COURT: And it would ignore the language of the statute, wouldn't it?

MR. RHYNE: I don't believe it would.

THE COURT: Doesn't it say, or?

MR. RHYNE: Or that fifty per cent of those persons voted. The words that have been twisted out of shape by Defendants and misconstrued are, such persons. I think a fair reading of the statute, Your Honor, is that such persons are the registrants and not the citizens of voting age.

Now, the figures for Texas -- and this is in the record of this case -- are that there were 7,500,000, or so, citizens of voting age, taking Defendants' figures, without making the required attempt to exclude the aliens, exclude the transients, military, and so forth. There were 5,200,000 registered, over half of the broadest and highest possible figure of citizens of voting age. And of the 5,200,000 registrants, 3,472,000 voted. They pass the fifty per cent either way, Your Honor, pass both tests, as long as this Court construes as a matter of law that the plain meaning of the statute, the plain meaning of the words, such persons, is that it refers to registrants.

I think that is a lawful way out of this statute, Your Honor, especially here where statistics cause problems that no one could have anticipated until the attempt was made to deal with the language minorities; and it is this Court's duty to construe the statute rationally and to save it; and this is a possible way.

Your Honor, if the Court please, Mr. Odam has a very brief closing comment.

THE COURT: Certainly.

MR. ODAM: Your Honor, it is just a comment, no further argument.

I simply want to again point out that we have before us today simply a very narrow but, in our judgment, a very important question that obviously applies to states other than just the Texas determination. That is, that in making the determinations referred to in Section 4, first of all, certain groups should be excluded, and that in making that determination, that the Director should make every reasonable effort to receive and accept evidence as to how many those are. And further, as Mr. Rhyne pointed out, that the Attorney General should make, in his initial determination, a determination of whether or not the test or device had a discriminatory effect and also initially determine whether or not incidents have been few in number, and so forth, as defined, as he pointed out, in Section 4(d).

I am sure I speak for the Governor and Secretary of State, that they wish to protect the voting rights of the persons of the State of Texas. We would only ask that the determinations that are to be made by these Federal agencies be rational determinations and as a matter of law they be determinations made excluding certain groups, and in excluding those groups they accept evidence as to how many persons are in those groups that should be excluded.

That is all that is before the Court today.

Thank you very much.

THE COURT: I am considering whether it would not be well for the Court to examine one or two of the matters that have been referred to again. I am going to rule orally from the bench. I have no written opinion.

I am inclined to think that the best thing to do would be to come back here at one-thirty, at which time I would give an oral ruling on these matters.

I would like to go over my notes and the comments made. You can expect that I will give you a ruling at one-thirty, if that is satisfactory to the parties.

Very well.

I do want to say I appreciate the energy and the help that both sides have given the Court in the short time available.

Having practiced law many years ago now, I know there have been some long nights and hard work. I appreciate what both sides have done.

(Whereupon at 12:05 p.m., the hearing was recessed, pursuant to reconvening at 1:30 p.m. of the same day.)

* * * * * * * * * * * * *

CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on September 12,1975 and that the foregoing Pages 1 to 83, inclusive, constitute the official partial transcript.

By S/S

PROCEEDINGS

* * * * * * * * * * * *

THE COURT: Because of the time factors involved in the case we heard this morning, Dolph Briscoe, et al., v. Edward H. Levi, et al., I have decided, as I indicated to counsel, that I should present an oral ruling. I don't intend, because I am dealing with it orally, to suggest in any way that the issues are not issues of consequence.

This case was filed in this Court House on September 8, 1975 and first came to the Court's attention on an application for a temporary restraining order, at which time, following discussion in chambers, the matter was set down for the proceedings we have had this morning.

The case has come to this Court because it is acting as the Motions Judge for the month of September and Judge Corcoran, who drew the case in the random assignment, is unavailable.

Plaintiffs, the Governor and Secretary of State of the State of Texas, brought this action because of their desire to enjoin, pending reexamination by the Court, two determinations which the parties understood were about to be announced by the Bureau of Census in accordance with the Bureau's obligations under the Voting Rights Act of 1965, as amended, particularly the recent amendments relating to bilingual aspects of state and Federal elections.

It appeared to the Court that the first publication which was scheduled under Title III, the determination and publication scheduled for Tuesday of this week, should go forward and the motion for temporary restraining order as to that determination which

concerned the number of Spanish-American individuals in certain counties of Texas should be denied.

The principal area of concern, of which that first publication was just a part, is the publication in the Federal Register, I believe scheduled for Monday of next week, which the Census Bureau contemplates making dealing, under Title II, with the State of Texas as a whole.

Injunctions, either preliminarily, temporarily or permanently against the publication of that determination next Monday, are sought by the Plaintiffs. The Government Defendants have responded by motion to dismiss; and the Court having invoked Rule 12, with consent of the parties at the outset, the Government submits, in the alternative to its motion, a prayer for summary judgment.

The issues are in one respect narrow in that this is a single-judge Court and there is no question as to the constitutionality of the statute presented or indeed attempted to be presented in these proceedings.

The first determination which the Court must make as to these new amendments, however, is a determination novel in the sense that these matters -- because of the recency of the amendments, last August, I believe -- have not as yet come before any other Court and the matters presented are of first impression.

Initially the question is raised as to the Court's jurisdiction to hear the complaint and hear the parties. The statute, in pertinent part, as amended, here before me contains the following section:

"A determination or certification of the Attorney General or of the Director of the Census

under this Section or under Section 6 or Section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

The Government Defendants contend that that provision deprives the Court of any jurisdiction in the present controversy. The Court does not agree. We have here a pure legal question of the interpretation of certain provisions in this new amendment. A Federal question is raised involving the interpretation of the Act. The Court does not read the provision referred to as an absolute bar to examination by a Federal judge when a party properly concerned challenges the interpretation by the Executive of a congressional statute.

This issue in various forms has been presented in other litigation. I would cite United States v. California Eastern Line, in 348, U.S., and Switchmen's Union, in 320 U.S., as examples where the courts, barring an explicit direction not to accept jurisdiction under any circumstance, have at least to a degree felt obligated as part of their duty to make such inquiry as is necessary to ascertain whether or not the Executive, in carrying out an Act of Congress, has proceeded in accordance with congressional directive.

There is a case or controversy presented. The Secretary of State of the State of Texas and the other Plaintiff have indicated that the effect of the publication contemplated may involve expenditure of up to $10,000,000. Issues of consequence to the administration of the voting soon in prospect in Texas in connection with a constitutional referendum on November 4 certainly give the State standing and create a genuine case or controversy which the Court feels it has jurisdiction to explore, both because of the nature of the Federal question and exercising the authority

presented to the Court in the declaratory judgment statute.

This is not a review of the computations made by the Director of Census following publication but is an examination prior to publication inquiring into whether or not the Bureau of Census or the Director of Census has properly applied the Act.

The test that the Court feels must be applied in this circumstance under the narrow jurisdiction which I have indicated is here present is to determine whether or not the interpretation given by the Director of Census to the statute is rational and whether it is or is not in the large consistent with the declared congressional purpose and the legislative history.

It will not, the Court believes, serve any purpose to discuss at length a number of the questions which are presented in this regard but I do want to touch upon each of them briefly so that the Court's reasons are clear.

The first claim that is made is that the Director of Census must grant the Plaintiffs a hearing before making his determination.

There is no provision for a hearing in the statute. The possibility of requiring a hearing was considered by the Congress and declined. The Administrative Procedures Act in no way affords a hearing under these circumstances; and the Court holds that Plaintiffs are not entitled to a hearing before the Director of Census prior to his determination.

While there apparently was some failure in full communication between the parties, it should be noted that the Director of the Census has considered and been receptive to certain materials which were submitted by the Plaintiffs during the process of the determination

about to be announced.

The next question presented is really a series of questions which involve interpretation of the statute. The Court is of the view that in each instance before the Court the determination by the Director of Census is rational, consistent with the purposes and meaning of the statute and consistent with the legislative history.

The Court is of the view that there has been proper consideration given to the status of aliens in making the computations and that the Director is reasonable in relying on data derived from answers to Census questionnaires.

It seems to the Court that he has properly interpreted the phrase, "citizens of voting age," in 4(b) and has permissibly included in that figure such groups as felons, military personnel and dependents, students and mental incompetents.

The Court is of the view that the Director has properly construed the phrase, "fifty per cent of such persons," and has reasonably determined that the Voting Rights Act, as amended, is applicable, among other things, if fifty per cent of the citizens of voting age residing in the jurisdiction didn't vote in the Presidential Election of November 1972.

Those, I believe, are the principal matters.

The question of whether or not the Director can rely on 1972 data seems to the Court to go to a constitutional issue rather than anything else and has not been considered.

While there has been some discussion of a determination by the Attorney General, the Court sees nothing in the record that indicates the Attorney General at this stage has made any determination.

Now the Court has reached this conclusion in part from an overview of the statute as a whole and, of course, has been substantially persuaded by the decision of the Supreme Court in North Carolina v. Katzenbach, in 383 U.S. 301, where wholly comparable if not identical matters were considered and approved by the Court.

The statutory scheme is one that is designed to avoid judicial delay at the preliminary stages of a voting problem. It is broadly designed by Congress to create a scheme that will trigger further inquiry and shift the burden from the United States to the state whose statistics have been determined to bring the Act into play.

There are protections in the Act. The Attorney General must bring enforcement proceedings where defenses are available. There is also under certain circumstances available remedies under the so-called bail-out provisions of the statute. But the first step is a step that a court cannot review except as I have here done to determine that the Director of Census has not acted in an arbitrary or illegal manner but rather that he has proceeded in a rational manner, consistent with the apparent meaning of the statute and that his interpretations of it at this stage must be sustained.

Accordingly, on the merits, the Court will grant the Defendants' motion for summary judgment and the complaint is dismissed.

I think I should, however, proceed a bit further -- in the event the Court in some fashion has erred -- and deal briefly with the question of whether or not this case presents any possible basis for preliminary relief by way of temporary restraining order or preliminary injunction.

I have already indicated why I feel there is no substantial possibility of success. It is apparent that the public interest is obviously served by protection of voting rights and not by protecting against possible expenditures by the state.

The facts as before the Court do not demonstrate any determination under the statute will change as the result of these interpretative questions. As a practical matter, the arithmetic, even if the interpretations desired by the Plaintiffs were brought into play, does not appear on the face of things at least to give any promise of changing the result triggered by the publication next Monday.

It is also to be noted in that connection that the Director of the Census has reserved the right to change his determination in some particular if he reaches the conclusion he should do so. The Department of Justice, as the legislative history intimated, has indicated a willingness to discuss interim procedures to alleviate if possible the full force of the statute against the State of Texas during the interim period between this publication and the announcement and carrying out of the vote on the 4th of November.

Under all these circumstances, I see no prospect of success and no reason to feel that preliminary relief of any kind is necessary. So that as an alternative to the dismissal of the complaint, the Court is denying any temporary restraining order or preliminary injunction as sought by the Plaintiffs here.

Now, I don't know, gentlemen, whether there is any desire on the part of the Plaintiffs to have this matter reviewed this afternoon upstairs in the Court of Appeals before the Motions Panel there. I am going to be available all afternoon. That would require some brief

order of some form which can be submitted to me and I will cooperate in any way that I can -- if there are any time factors in that regard -- to assist in that process.

The proceedings have been interesting and the Court appreciates the assistance of both sides.

If there is nothing further, that concludes these proceedings.

MR. ODAM: May I be heard, Your Honor?

Your Honor, in light of the statement by the Court that the publication is to be on next Monday --

THE COURT: That is what I understood. Is that the case?

MR. LANDSBERG: No, Your Honor.

THE COURT: I was told you were going to delay it a week; that it was due last Monday and now it was going to be this Monday, When is it going to be?

MR. LANDSBERG: A definite date has not been set. It will probably be sometime next week but not Monday.

THE COURT: Well then, I was misinformed as to that. That was why I pushed this matter along this afternoon, thinking it was going to be next Monday.

MR. ODAM: In light of that, Your Honor, if Mr. Landsberg, on behalf of the Defendants, would be willing to agree, as we did at the temporary restraining order, that the publication would not be made until at least later on in the week, say, Thursday or Friday, that would give Mr. White an opportunity to confer with Governor Briscoe back in Texas as to whether or not we want to take an appeal.

THE COURT: That would be fine. I misinterpreted the statement made in chambers that the publication would be delayed a week. I took that to mean it would not be delayed more than a week. Apparently I was wrong.

MR. ODAM: If publication would be as late as, say, next Thursday, that would give the two Plaintiffs an opportunity to decide whether or not they would want to come back and do as the Court suggested.

THE COURT: What is the defense position about that?

MR. LANDSBERG: I think probably, Your Honor, that under ordinary circumstances it would be made next Thursday, in any event.

THE COURT: All right. The Plaintiffs can be assured that it will not be made before Thursday?

MR. LANDSBERG: Yes, Your Honor.

THE COURT: Very well. That will give you time to present to me next Monday whatever order or other matters of that kind you may find necessary.

I think that is a sensible way to proceed because late Friday afternoon is not the time to take a complex matter to a busy Motions Panel. If you do decide you are going to have a review, you will have a little more time to get the matter in shape.

All right, fine. Thank you, gentlemen.
(Whereupon the hearing was concluded.)

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CONTINUED IN VOLUME III